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ASH Files Reply to OSHA's Arguments [09/24-1]

After ASH sued the Occupational Safety and Health Administration (OSHA), seeking to compel the agency to issue a rule virturally prohibiting smoking in all workplaces, OSHA responded offering a number of excuses why the U.S. Court of Appeals should not compel it to take action on this rule, even after a delay of over 10 years. ASH has now filed its reply to OSHA's arguments. A copy of that reply -- including footnotes -- appears below.

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

:

In re: Action on Smoking and Health (ASH) :

Petitioner :

: No. 01-1199

The United States Department of Labor, et. al :

Respondents :

:

REPLY OF PETITIONER ACTION ON SMOKING AND HEALTH TO RESPONDENTS' RESPONSE

SUMMARY: After more than ten years of delay in dealing with the most dangerous workplace hazard -- one OSHA estimated kills almost 8,000 workers each year -- and which Maryland's MOSH

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was able to regulate in months [21 Md. Reg. 1336 1994], OSHA cites three outside-the-record documents seeking to justify even further delay before making any decision -- even a decision not to regulate tobacco smoke in the workplace. (1)

But the suggestion in the first that exposure to tobacco smoke has declined over the past several years hardly justifies even more delay because, even under OSHA's most extreme assumptions, the risk remains not only "significant," but more significant than those addressed by all of its other rulemakings.

The suggestion in the second that it might someday in the future be possible to quantitatively measure exposure to ETS is legally irrelevant because the law requires OSHA to set an exposure standard to the lowest feasible level -- which for tobacco smoke is zero, not some part-per-million exposure level.

The argument from the third that smoking bans may not be feasible for restaurants is frivolous since several states and scores of municipalities have done it successfully.

Why It Is Unfair to Permit Further Delay Based Upon Outside-the-Record Documents

Respondents title the materials on pages 5-9 of their Response as "subsequent developments in the rulemaking," but nothing could be further from the truth. Although agencies routinely re-open rulemaking proceedings where it seems to be appropriate to do so, OSHA did no such thing here. Indeed, as they admit, not only are the three documents they refer to not a part of the rulemaking, they have not even been placed in the rulemaking record although even the most recent document was published years ago.

Moreover, it appears that many who participated in the ETS rulemaking proceeding, and have a strong demonstrated interest (as well as expertise) in this matter, were given no individual notice and therefore no opportunity to comment (2) -- thereby defeating the very purpose of requiring agencies to develop rules through a notice and comment rulemaking proceeding where all interested persons can participate. (3)

Action on Smoking and Health (ASH) respectfully suggests that it is highly improper and in violation of the spirit if not the letter of the Administrative Procedure Act, 5 U.S.C. § 553, for OSHA to seek to circumvent the rights accorded to individuals to participate in rulemaking proceeding by holding meetings entirely outside the rulemaking record, and then seeking to use them to justify even further delay in taking any reviewable action. Rather than providing an excuse for even more delay, this suggests even more strongly the need for the Court to exercise at least minimal supervision: ordering the agency, after more than ten years of delay, to make some kind of final decision. (4)

Discussion of All of the Documents

Respondents cite three documents (5) as the major reason why this Court should once again allow them to continue to delay any decision on what to do about tobacco smoke exposure in the workplace. Indeed, they seem to suggest that the Court should only focus on those three documents, rather than evaluate whether there has been "unreasonable delay" since this process started more than ten years ago.

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At the outset we must note what these documents are. First, they are NOT part of the rulemaking record. Second, they resulted -- not from the participation of a wide variety of interested individuals and organizations -- but rather from the inputs from a small number of persons selected by the government. Third, they are not studies or reports, and they may not even represent proper conclusions, even of those chosen by OSHA to participate. Rather, they appear to be nothing more than a collection of individual papers. (6)

Finally, and perhaps most importantly, nothing in these documents -- nor, indeed, anywhere in the Response -- tends to refute what OSHA found which forms the basis of this rulemaking proceeding:

1. Environmental tobacco smoke [ETS] is a known human carcinogen.

2. This has been shown not only by dozens of studies published at the time of the hearings, but also by animal bioassays and in vitro studies, and the chemical similarity between mainstream smoke and ETS.

3. ETS can and does cause cancer and cancer deaths in humans exposed to it at levels typically found in homes where one spouse smokes.

4. Exposure to ETS in levels found in homes where one spouse smokes increases the risk of lung cancer in nonsmokers by about one third. [59 Fed. Reg. 15968, 15995].

Exposure Assessment Workshop

Respondents first argue [at 7] that "the proposed rule had found, preliminarily, that the level of ETS present in workplaces was, on average, equivalent to the level present in homes in which smoking occurs [citation omitted]. This finding of equivalence in the levels of ETS in workplace and in homes was critical because, at the time of the proposal, most studies of health effects of ETS examined the lung cancer risk to nonsmoking housewives in homes in which the husband smoked."

However, in the rulemaking proposal, OSHA recognized the obvious fact that the dangers of exposure to a carcinogen do not depend on where the exposure occurs or to whom:

As noted by Meridian Research in their 1988 report, ". . . it is the exposure to environmental tobacco smoke, and not the environment in which that exposure occurs, that is the important risk factor" [Ex. 4-221]. Therefore, health effects observed and the risk estimates calculated from studies of the general population, or of selected subgroups, such as nonsmoking wives of smoking husbands, are relevant to the working nonsmoking population. . . .

OSHA believes that there is no physiological difference related to exposure (or its outcome) regardless of where it is experienced. This is true regardless of whether the endpoint is lung cancer, heart disease, or indoor air related acute irritant effects. The only difference is that the degree of exposure may be greater in one place than in the other. . . . Thus, risk estimates based on residential exposures are expected to accurately reflect occupational risks in most workplaces and possiblyunderestimate the risk in some workplaces. [emphasis added] [59 Fed. Reg. 15968, 15994]

Respondents then argue [at 7] that "Based upon this data, the participants recognized that ETS exposures in the workplace had 'sharply declined' over the last decade as a result of smoking policies

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implemented by employers voluntarily or to comply with state or local smoking ordinances." But even if the total number of ETS exposures has declined because employers are increasingly prohibiting workplace smoking, this in no way reduces or diminishes the risk to tens of millions of employees in workplaces where smoking is still permitted. In short, the fact that workplace smoking has been banned in the most populous state [California] provides zero protection for workers in North Carolina, Virginia, and most other states where it continues. (7)

Respondents then cite [at 7] only one study from this outside-the-record proceeding for the proposition that: "One study cited in the report found that in general exposure levels were much lower than those in earlier studies, and the ETS levels in workplaces where smoking was restricted to designated areas were 2 to 8 times less than the levels present in facilities where smoking was not restricted." But this argument for further delay is fatally flawed.

As previously noted, OSHA's original estimate was that exposure to tobacco smoke in the workplace increased an employee's chance of contracting lung cancer by about 34%. Even assuming that ETS levels in the workplace were now 8 times lower, as this one and only study no more than suggests, the risk -- presuming, as OSHA does, a linear relationship between exposure and risk -- would still be an increased risk of usually-fatal lung cancer of over 4% [34% divided by 8 = 4.25%].

Another way to put this one study into context would be to note that OSHA estimated that ETS exposure in workplaces killed about 8,000 workers each year. (8) Even assuming that ETS levels in the workplace were now 8 times lower, as this one study no more than suggests, the death rates -- presuming, as OSHA does, a linear relationship -- would still be 1,000 workers a year. This number is still far larger than OSHA's own estimates for the number of lives saved by all of the rules it adopted ADDED TOGETHER over the past ten years while failing to respond to ASH's petition. One Thousand unnecessary deaths a year is also inconsistent with the statutory command to OSHA to issue standards for toxic substances so that "no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." [29 U.S.C. ¶ 6 (b)(5)]

Still a third way to examine the effect of this assumption from the one study Respondents rely upon is true is to note that OSHA estimated the "lifetime occupational risk" to nonsmoking workers ranged from 1.1 to 17 deaths per 1000 workers [Id. at 15,996] -- for an average of estimated risk of 9.05. Even reducing this risk by a factor of eight, as suggested by the paper, would still leave a relative risk of over 1 per 1,000; clearly a risk which is significant, especially considering that tens of millions of workers are exposed to it.

Thus, even assuming that exposure to tobacco smoke in workplaces where smoking is still permitted has been reduced by a factor of 8, tens of millions of workers are still being subjected to significant health risks which would be eliminated if the ETS rule were finally issued. The argument that "ETS exposures in the workplace should be re-examined using new approaches suggested in recent scientific literature . . . [because] OSHA would then be able to determine more reliably whether ETS exposure in the workplace is a significant hazard to workers" [at 7,8] is a smokescreen.

Risk Assessment Workshop

Based upon the second outside-the-record document, Respondents suggest [at 8] that "new approaches were available that might be used to assess the health effects of exposure to ETS at various levels in the workplace." But, even if this were true, it would appear to be irrelevant as a matter of law.

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The Occupational Safety and Health Act provides that "The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." [29 U.S.C. ¶ 6 (b)(5)] [emphasis added]

The U.S. Supreme Court, in Industrial Union Department v. American Petroleum Institute, 448 U.S. 607, 615 (1967), held that, as a threshold requirement, the Secretary must first make a finding the exposure constitutes "a significant health risk in the workplace and that a new, lower standard is therefore 'reasonably necessary or appropriate to provide safe or healthful employment and places of employment.'"

But while the plurality opinion does state that the agency must find that a significant risk exists before it can initiate rule making to regulate it, it certainly does not say that the agency must show that there is a "significant risk" at or about the level of the proposed regulation. Indeed, throughout the plurality opinion, the language used is a "threshold" finding (determination) of "significant risk." Once that threshold finding is made, exposure should be regulated down to the lowest level which is technologically and economically feasible.

In Industrial Union, OSHA proposed to lower the existing permissible exposure limit (PEL) from 10 ppm to 1 ppm. The plurality opinion held that this was improper because the agency had not made a finding that a significant risk existed at the current exposure level of 10 ppm. But it did not require that the Secretary make a finding that there is significant risk at the 1 ppm level, or just above the 1 ppm level.

In the instant situation before OSHA, there is no existing standard, and OSHA has found that the risk of death is so significant that about 8,000 workers will be killed each year from workplace exposure to tobacco smoke. Even if the exposure level were lowered by a factor of 8 -- as suggested by the single paper Respondents seek to rely upon -- almost 1,000 would be killed every year. Therefore, having made such a threshold finding, the statute requires OSHA to set the lowest level which is feasible from both a technological and economic point of view; not to set an exposure level which would provide any specific level of fatalities.

In most situations of workplace exposure to toxic chemicals, the "lowest feasible level" requirement does dictate that some non-zero exposure level be set, but only because the chemical is necessary for some industrial process, and it is either technologically and/or economically not feasible to reduce the level to zero in those specific industries. However, with regard to ETS, the reverse is true.

With the possible de minimis exception of testing cigarettes for tar and nicotine content, tobacco smoke is not an essential for any workplace process or activity. Therefore, it is clear that it is both technologically and economically feasible to reduce the level of tobacco smoke to zero. Since this is true, then the speculative scientific possibility that it might one day be possible to devise one overall quantitative measure of the substance ETS which contains 5 regulated hazardous air pollutants, 47 regulated hazardous wastes, 60 known or suspected human carcinogens, and more than 100 different chemical poisons is irrelevant.

There is no suggestion that the U.S. Supreme Court would permit -- much less require -- OSHA to set

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some exposure limit higher than the lowest feasible level in order to achieve some specific fatality ratio -- e.g., 1 in 1,000, or 1 in 10,000 -- especially when tens of millions of workers are routinely exposed to the toxin being regulated. Any such suggestion would defy not only logic by also the OSHA statute which commands OSHA to set a standard which will ensure that no employee "will suffer material impairment of health . . . even if such employee has regular exposure to the hazard . . . for the period of his working life." (9)

Feasibility Workshop

To avoid any possible misunderstanding here, it is important to note at the outset that this third outside-the-record workshop did not even purport to seek to determine if smoking bans were feasible in restaurants and certain other very narrow industry sectors. Rather, these hand-picked participants were asked to assume that a workplace smoking ban would not be feasible, and to determine if so-called engineering controls might be able to reduce the risk to some acceptable level. [See report cited in footnote 2]

What they found was that while it might be theoretically possible -- using new largely unproven technology -- to reduce ETS exposure up to 90% from current levels already attained by existing technology, they were not asked by what date this could be achieved, nor to make any finding that such levels would reduce the risk to any particular safe level. Indeed, given OSHA's own findings, it is highly unlikely, since OSHA found that restaurant workers were exposed to much higher concentrations of tobacco smoke than most other workers, (10) thereby placing them at even higher risk of death than most workers.

Moreover, the Response belies any suggestion that a ban on smoking in workplaces in general -- or even in restaurants, for example -- is not feasible. Having already sought to rely upon the undisputed fact that "ETS exposures in the workplace had 'sharply declined' over the last decade as a result of smoking policies implemented by employers voluntarily or to comply with state or local smoking ordinances," [at 7, emphasis added] they cannot now turn around and suggest that exactly such restrictions are not feasible. An OSHA ban would obviously be functionally equivalent to a ban imposed by "state or local smoking ordinances."

It is impossible to argue that banning smoking in restaurants isn't feasible -- or that some new proceeding is now necessary to determine if it is feasible -- when it has in fact been done (and in effect) for many years in our most populous state (California); in a tobacco-growing state (Maryland, which bans smoking in restaurants except around the bar areas); in Utah, Vermont, and Maine, and in scores of cities, counties and towns. (11) Indeed, this Court can take judicial notice of the many jurisdictions which have banned smoking in restaurants; and of common knowledge that restaurants continue to operate in those jurisdictions. (12)

It is true that, at the time of the publication of the OSHA rulemaking proposal, there were few statutes banning all smoking in restaurants, and the success of these statutes were not widely known. However, given the many years of experience with such bans in the diverse states and many cities, counties, and towns cited above, this Court may well be justified in taking judicial notice that such restrictions are economically feasible. At the very least, it certainly cannot take Respondents more than 90 days after the service of any order this Court might issue to inform themselves on this issue, and to rule accordingly.

Respondents' Legal Arguments

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In addition to the arguments already addressed based upon the outside-the-record documents, Respondents raise several additional ones. As in the past, they argue that any order by this Court regarding ETS may prevent OSHA from taking actions which are more important. However, as previously noted, none of the rules OSHA has promulgated over this entire ten year period have begun to compare with an ETS rule in terms of persons exposed, estimated lives saved, reduced costs, etc. Moreover, OSHA is likely to have released its Fall agenda by the time this Court acts, so that the Court can evaluate that argument in terms of specific examples rather than vague generalizations -- while giving due deference to OSHA's discretion.

On page 19 Respondents argue that "ASH's challenge to the omnibus nature of the rulemaking is not justiciable." ASH does not maintain that the mere blatant violation of OSHA's own regulations compels this Court to issue an order in the nature of mandamus, but rather that the admitted violation of several of its own published Cancer Policy regulations, especially once it becomes clear that the violation is delaying a much-needed rule, (13) can be considered as one circumstance under the "rule of reason" factor under TRAC. (14)

Similarly, while Respondents continue to stress this Court's prior holding in ASH IV that the cancer time limits are only aspirational, that determination was made when OSHA had missed the deadline by only a few months. A determination that regulations aimed at requiring a decision within a period of 90 to 180 days were not violated by an additional delay of only a few months does not necessary mean that a further delay of more than four additional years does not constitute unreasonable delay. (15)

As early as 1994, this Court expressed serious concern about OSHA's failure to act on ASH's petition to regulate ETS in the workplace. In ASH I, 28 F.3d at 165, the Court stated:

Although we do not find unreasonable agency delay on the facts now before us, we are mindful of OSHA's prolonged delay in regulating ETS. TRAC has made it clear that this court will not permit agency gridlock to frustrate the statutory mission Congress has given agency. The teachings ofTRAC should remind both parties that petitioner may renew its petition if OSHA fails to pursue its rulemaking with due dispatch. [emphasis added]

OSHA's record in dealing with ETS for more than ten years has been one of inaction, procrastination and delay -- and now the agency wants even more time based upon specious arguments from self-serving documents generated outside the rulemaking record. As this Court recognized in Public Citizen v. Brock, 823 F.2d 626, 627 (D.C. Cir. 1987), a case involving a delay on only six years, there comes a time when the Court **"MUST LEAN FORWARD FROM THE BENCH TO LET AN AGENCY KNOW, IN NO UNCERTAIN TERMS, THAT ENOUGH IS ENOUGH."** [emphasis added]

If ever there was such a case, it is surely this one. The delay has extended over ten years, excuse after excuse for delay has been offered and accepted by this Court, arguments that OSHA needed leeway and discretion to deal with more important matters has proven to be a sham, and now OSHA says it cannot decide within 90 days after a court's order whether smoking bans in restaurants (like existing ones in California, Maryland, etc.) are feasible; whether millions of workers are still being exposed to smoke in great majority of states which do not ban smoking in private workplaces, (16) etc. **This Court's action now can save thousands of lives each and every year. We beg it to finally do so.**

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Because ASH was forced to respond to three entirely new and confusing arguments within only a ten page document, ASH respectfully suggests the desirability of oral argument.

Respectfully submitted,

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1. The first sentence of Respondents' response misstates the nature of the action and the relief requested. As clearly stated in its petition, ASH "requests the issuance of a writ of mandamus directing the Secretary of the Department of Labor and the other respondents to issue a final decision on ASH's petition to regulate environmental tobacco smoke ('ETS') in the workplace within 90 days of this Court's order." [emphasis added]

This distinction appears to be crucial, since Respondents' counsel states on page 9 that "it is now clear that OSHA cannot proceed simply to promulgate a final rule on ETS." If it is clear to OSHA even at this time that it will decline to issue a final rule on ETS, then arguably it should have no trouble complying with an order by this Court directing it to take some final action -- including possibly finally denying ASH's petition -- within 90 days (or any other time period specified by the Court). Then ASH, or any other entity affected thereby, would finally be able to seek review of the agency's final order clearly stating its reasons for refusing to take any action against the most deadly workplace toxin for over ten years; rather than continuing to battle -- as ASH has now for over ten years -- against vague self-serving arguments made by counsel alone as to why delay after delay is justified, and why OSHA need not take any definitive (i.e., reviewable) action regarding ETS.

2. Action on Smoking and Health (ASH), although it participated in the ETS rulemaking proceedings, and had taken OSHA to court numerous times over this issue as Respondents recite in their Response, was not given notice of these three meetings, much less invited to participate or comment in any way.

3. For example, the workshop on Environmental Tobacco Smoke exposure consisted of "invited participants," Preface, at 307 (May 1999). James Repace, one of the leading experts and most prolific researchers in the field, was denied permission to either attend or participate in the exposure assessment workshop, was invited to attend the risk assessment workshop but denied permission to participate, and was not invited to attend or even to participate in the Hospitality Conference Panel. The State of California -- which has the most experience of any state regarding local ordinances and then a state-wide law banning smoking in restaurants -- was so distressed by the biased result of the Hospitality panel that it commissioned Mr. Repace to write a critique of this workshop. A copy of that report can be found on the State's official web site:

< www.dhs.ca.gov/tobacco/html/Evaluation_Reports.htm >. This information supplied by James Repace.

4. In the instant proceeding, OSHA seeks to justify refusing to adopt the control measure ASH proposed -- and OSHA itself accepted in its notice of proposed rulemaking -- largely if not solely on

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the basis of materials outside the record. Yet in Ober v. EPA, 84 F.3d 304 (9th Cir. 1996), the Court remanded an EPA rule involving airborne particulates because the EPA has received and relied on 300 pages of post-comment-period documents as its justification for rejecting certain control measures.

More than twenty-five years ago, this Court, in Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (1973), reviewed an EPA emission source standard. The standard issued by the EPA was based upon testing that had not been made a part of the public record, and to which the parties never had an opportunity to respond. This Court overturned the agency's determination. See also,Connecticut Light and Power Co. v. NRC, 673 F.2d 525 (D.C. Cir. 1982), cert. denied, 459 U.S. 835 (1982) ("An agency commits procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."); and Aqua Slive 'n' Dive Corp. v. Consumer Product Safety Commission, 569 F.2d 842 (5th Cir. 1978) (invalidating agency rule when public was not given the opportunity to comment on a study).

5. Environmental Health Perspectives, Vol. 107, Supplement 2 (May, 1999) ("Exposure Assessment Report"); Supplement 6 (December 1999) ("Health Risk Assessment Report"); Proceedings of the Workshop on Ventilation Controls for Environmental Tobacco Smoke the Hospitality Industry, U.S. Dept. of Labor, Occupational Safety and Health Administration, ACGIH Worldwide, Cincinnati, Ohio (June 7-9 1998) ("Ventilation Control Report").

6. For example, the Summary of the Risk Assessment meeting states [at 823] that "There was no attempt to achieve group consensus on all issues; consequently this summary should not be construed as necessarily reflecting the view of all participants" -- much less those who are interested or knowledgeable about the subject.

7. Few states prohibit smoking in all workplaces. See < www.no-smoke.org/100ordlist.html >.

8. OSHA estimated that its ETS rule would prevent between 2,234 and 13,723 deaths a year from cancer and coronary heart disease, for an average of 7,978. 59 Fed. Reg. 15968, 16011

9. OSHA found in its notice of proposed rulemaking that approximately 74 million nonsmokers were exposed to ETS in the workplace [59 Fed. Reg. 15968, 16001]. Even assuming that this number has been slashed by a factor of 8 in the years since that finding, it would still leave more than nine million nonsmokers exposed today. If 9,000,000 are exposed to a 1 in 1,000 risk of death per year, 9,000 will die each year, and 405,000 will die over the 45 years OSHA estimates they will work. Even at a risk of 1 in 10,000, 900 will die annually, and 40,500 will die over their estimated working lifetimes.

10. See, e.g., "Pregnant women working in indoor environments without tobacco smoking restrictions, as in restaurants, comprise one of the most heavily ETS-exposed groups [Exs. 4-151, 4-287]. [Id. at 15979]; The most ETS-exposed nonsmokers were those with 10 or more hours per day of work (especially at plants/factories), more than 2 hours per day of restaurant time, and more than 1 hour per day of bar or nightclub time. [Id. at 15989]; However, in some workplaces, such as restaurants and transportation facilities, exposures are significantly higher. [Id. at 15994] [emphasis added]

11. California, CA Labor Code ¶ 6404.5 (1994); Maryland, Code of MD Regs ¶ 9.12.23 (1994); UT Code Ann. ¶ 26-28-1 (1994); Vermont, VT Stat. Ann. Title 18, ¶ 1744 (1993); Maine, ME 22 MRSA ¶1541, sub-¶4, and sub- ¶5 (1999). For more information, and for a list of localities which have banned smoking in restaurants and in other workplaces, see < www.no-smoke.org/100ordlist.html >.

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12. Although California and a number of other jurisdictions have successfully banned smoking in bars, Respondents might try to argue that the economic feasibility of smoking bans in bars (and perhaps also gambling casinos) hasn't been adequately demonstrated. However, even assuming that this were true, it would certainly be unreasonable -- and therefore constitute "unreasonable delay" -- to further delay the issuance of a rule expected to save thousands of lives each year simply to make a more comprehensive determination regarding a very narrow industry segment. Instead, if that were the case, OSHA should simply decide whether or not to issue a rule regarding workplace smoking which would exempt -- at least for now -- bars and gambling casinos.

13. Inside OSHA recently reported [01/22/01 at 3]: [Former OSHA head] Jeffress said one of his disappointments was that he was not able to move the indoor air quality (IAQ) rule. He noted the standard "turns out to be really difficult," regarding what in mold and mildew causes illness [i.e., the IAQ portion]. Although Jeffress pointed out that the "tobacco part of the rule is not difficult," the two parts were not separated." [emphasis added]

14. ASH respectfully suggests that when the agency ignores its own binding regulations by treating ETS (a known human carcinogen which comes from a single source from which exposure can be completely eliminated) with hundreds of different non-carcinogens (including feathers and dust and mold which are poorly studied and from which exposure cannot be eliminated) all in one large rulemaking; permits evidence far beyond the scope permitted for carcinogens to be introduced; and finally then uses the length and complexity of the record as an excuse for its inaction, these factors can and should be considered under TRAC's so-called "rule of reason."

15. Indeed, as Judge Wald noted: "The panel's determination that the Cancer Policy deadlines are "aspirational," without more, is not a sufficient basis on which to conclude that the rest of the Cancer Policy was similarly without binding effect. . . . But of course it is well established that agency regulations have the force of law and an agency is not free to disregard its regulations at will. . . . I am concerned that the opinion not be taken to signal any reprieve from an agency's obligation to proceed with due speed even when statutory and regulatory deadlines are not mandatory, or to follow its own regulations so long as they are in place. [concurring in this Court's denial of ASH's petition for review in Banc, 107 F.3d 901, 902-3 (1997)]

16. In footnote 4 on page 12, OSHA notes that 21 states restrict smoking in private worksites, and 33 restrict smoking in restaurants. But that obviously means that the majority of states do NOT restrict smoking in private workplaces (29, or 58%) and many don't in restaurants (17, or 34%).

Moreover, since only a handful of states ban (rather than "restrict") smoking in private workplaces and/or restaurants, the restrictions imposed may be minimal and/or create smoking sections where level of ETS is much higher because so many smokers are concentrated in one smoking area.

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